



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2004

Ms. Denise Nance Pierce
Bickerstaff, Heath, Smiley,
Pollan, Kever & Mcdaniel L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2004-9606

Dear Ms Pierce:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213274.

The Carroll Independent School District (the "district"), which you represent, received a request for (1) certain contracts, agreements, understandings, and/or other documents involving the district; (2) documents that reflect revenue and/or bartered goods and/or services after April 21, 2003 relating to the district and four named entities; (3) documents reflecting communications between the district and any one of twenty-two named entities; (4) documents reflecting the district's purchases or sales of food items from any of three named entities; and (5) four other categories of documents, communications, and invoices involving the district. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code, and that portions of the requested information are protected by Rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted information.

First, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Exhibit A contains information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body. These documents are expressly public under section 552.022(a)(3) unless they are confidential under other law. Although you claim that Exhibit A is excepted under section 552.103, this section is a discretionary exceptions to disclosure and therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the documents within Exhibit A that are subject to section 552.022(a)(3), which we have marked, under section 552.103.

We note, however, that some of the documents within Exhibit A that are subject to section 552.022(a)(3) contain account numbers that are confidential pursuant to section 552.136 of the Government Code. Section 552.136 excepts from disclosure certain account numbers and other “access device numbers.” This section provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the account numbers that must be withheld under section 552.136.

We next turn to your arguments for the information in Exhibit A that is not subject to section 552.022. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that a suit has been filed against the district, styled *Stephen Kaminski v. Carroll Ind. Sch. Dist., et. al*, Cause No. 342-206184-04, in the 342nd Judicial District Court in Travis County, Texas. Based on the information you provided, we agree that litigation involving the district was pending at the time it received the instant request for information. In addition, we find that the information you have submitted as Exhibit A is related to the pending litigation for purposes of section 552.103(a). Thus, you may withhold the remaining information in Exhibit A pursuant to section 552.103 of the Government Code.¹

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends when the related concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

¹Because our ruling on this information is dispositive, we need not address your remaining arguments for Exhibit A.

We now turn to Exhibit C. As you note, Exhibit C consists of bills for attorney's fees that are also expressly public under section 552.022 of the Government Code. *See* Gov't Code § 552.022(a)(16). You claim that certain information within the submitted fee bills is protected by Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider whether any of the information within the fee bills is protected by the attorney-client privilege as encompassed by Rule 503.

Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1); *see id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer"). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

A governmental body seeking to withhold information from public disclosure pursuant to the attorney-client privilege must: (1) demonstrate that the document at issue is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) demonstrate that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Open Records Decision No. 676 (2002).

You state that the fee bills contain confidential attorney-client communications between district officials and attorneys for the district. Upon review of your arguments and the submitted information, we find you have demonstrated that most of the information you have marked is protected by the attorney-client privilege. Accordingly, we have marked the portions of the submitted information that the district may withhold under Rule 503 of the Texas Rules of Evidence. The remainder of Exhibit C information must be released.

In summary, we conclude (1) the district must release the documents in Exhibit A that are subject to section 552.022(a)(3) of the Government Code, except for the account numbers we have marked, which are confidential under section 552.136 of the Government Code; (2) the remainder of Exhibit A is excepted under section 552.103, to the extent it has not been seen by the opposing party to the litigation; and (3) the district may withhold the information we have marked in Exhibit C pursuant to Rule 503 of the Texas Rules of Evidence. The remainder of Exhibit C must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah Swanson", with a long horizontal flourish extending to the right.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 213274

Enc. Submitted documents

c: Ms. Mary Ann Kaminski
1706 Redwing Drive
Southlake, Texas 76092
(w/o enclosures)